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No. 86-341

In The
Supreme Court of the United States
October Term, 1986

FORT HALIFAX PACKING COMPANY, INC.,
Appellant,

v.

P. DANIEL COYNE, Director, Bureau of Labor Standards, Maine Department of Labor, et al.,
Appellees.

On Appeal from the Maine Supreme Judicial Court

BRIEF FOR APPELLEE P. DANIEL COYNE

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QUESTIONS PRESENTED

1. Whether a state statute that imposes a one-time obligation to provide severance pay in the absence of an agreement between employer and employee creates a private "employee benefit plan" within the meaning of ERISA and is therefore preempted by 29 U.S.C. § 1144(a).

2. Whether a state statute that applies alike to union and non-union workers, that does not interfere with any of the economic self-help weapons available to combatants in a labor dispute, and that imposes certain substantive terms on the employer-employee relationship is preempted by the National Labor Relations Act.

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STATEMENT OF THE CASE

A. The Maine Severance Pay Statute

The Maine severance pay statute, which is codified at Me.Rev.Stat.Ann., tit. 26, § 625-B (Supp. 1986), is designed to reduce the severe and sudden economic effect of a major plant closing upon the affected employees and the surrounding community. *See Shapiro Bros. Shoe Co. v. Lewiston-Auburn Shoeworkers Protective Assn.*, 320 A.2d 247, 254-55 (Me. 1974) (discussing earlier version of current statute). The problem of plant closings is particularly acute in Maine because of the number of Maine

towns where one major plant is the dominant employer. No other state has such a law.

The Maine statute applies to employers who have more than 100 workers and who close their plants or relocate more than 100 miles. § 625-B(1)(A), (F), (G). There is no liability under the statute if an employee is covered by an express contract on the subject of severance pay. § 625-B(3)(B). There is also no liability if the plant closing results from bankruptcy or natural calamity. § 625-B(3)(A). *See* § 625-B(1)(E). Only employees who have worked at a plant for three years or more are entitled to severance pay, and the statute requires that each eligible employee be paid one week of severance pay for each year the employee worked at the plant. §§ 625-B(3)(D), § 625-B(2).

B. The Closing of the Fort Halifax Plant

Prior to May 1981, the Fort Halifax Packing Company ("Fort Halifax") operated a poultry processing and packaging plant that employed more than 100 employees in Winslow, Maine. Fort Halifax began operating the Winslow plant in 1972, when it purchased the plant and certain other assets from the Ralston Purina Company. The Winslow plant had previously been operated by Ralston Purina from 1961 through 1972 and by the CMT Company, Inc. prior to 1961. (J.A. 6-7). As of May 1981, therefore, a number of Fort Halifax employees had worked continuously at the Winslow processing plant for 20 years or more.[1]

[1] The number of years each Fort Halifax employee had been employed at the Winslow plant is set forth in Exhibit A to the Supplementary Employee list filed on June 3, 1983 in the trial court.

On May 23, 1981 Fort Halifax ceased all processing at the Winslow plant and laid off almost all of its employees. (J.A. 8). Fort Halifax did not pay its employees severance pay as provided by 26 M.R.S.A. § 625-B.

At the time of the plant closing, most of the Fort Halifax employees were represented by Local 385 of the Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO, and its successor, the United Food and Commercial Workers, AFL-CIO. (J.A. 7).[2] The existing collective bargaining agreement between Fort Halifax and Local 385 (J.A. 10-34), had been entered into on June 20, 1979 and was due to expire on June 2, 1982. This agreement contained no provision for severance pay. (Tr. 86). There was also no contract or agreement on the subject of severance pay between Fort Halifax and its non-union supervisory and clerical personnel. (Tr. 99).

More than five months after Fort Halifax ceased all processing operations at the Winslow plant, Fort Halifax and Local 385 reached a new agreement on certain amendments to the collective bargaining contract. (J.A. 34-39). This agreement, which was signed on November 1, 1981, arose out of efforts by Fort Halifax to dispose of the plant after the shutdown or allow it to be reopened under new management. (Tr. 112-13). It was intended to take effect only if the plant were reopened. (Tr. 87-89). For the first time, the November 1, 1981 amendment contained provisions covering severance pay. (J.A. 36-38). These provisions, which limited severance pay to a maximum of four

[2] A few workers at the Fort Halifax plant were represented by Local 340 of the Teamsters Union. Trial Transcript of April 1, 1985 (hereinafter cited as "Tr.") at 103-04.

weeks or 8% of the previous year's earnings, were expressly designed to supplant the state severance pay law pursuant to the "express contract" exception contained in 26 M.R.S.A. § 625-B(3)(B). (J.A. 37). Because the plant was not reopened, however, these provisions never took effect. (Tr. 87-89).

As of May 1981 Fort Halifax was a wholly-owned subsidiary of Corbett Enterprises, Inc., a holding company whose headquarters are located in West Hartford, Connecticut. Corbett Enterprises, Inc. maintained two ERISA-covered retirement plans for its employees and the employees of its subsidiaries. Production workers employed by Fort Halifax were covered by the Corbett Enterprises Retirement Plan for Production Employees (the "Production Employees' Plan"). (J.A. 40-67). Supervisory and clerical personnel employed by Fort Halifax were covered by the Corbett Enterprises Retirement Plan for Sales, Administrative and Clerical Employees. (J.A. 8). Neither of these plans contained any provision for severance benefits.[3]

The Corbett retirement plans provide for payment of modest pension benefits commencing when an employee reaches retirement age, along with certain death benefits. These payments are increased if an employee chose to contribute a portion of his annual earnings while working. *See* Production Employees' Plan, Section 3.1 (J.A. 43). For production employees who did not contribute any portion of their own earnings, the annual retirement benefit amounts to 1¼% of the first $6,000 of their annual earnings for each year of service completed after February 5, 1972. Production Employees' Plan, section 4.1(a). (J.A. 45). The maximum annual benefit can thus be calculated by multiplying $75 by the number of qualifying years of service. Under this formula, and aside from any amounts that might be attributable to employee contributions, Fort Halifax employees who had completed ten years of service as of the 1981 plant closing will receive an annual retirement benefit of $750.[4]

Pursuant to the terms of the retirement plans, employees who had voluntarily contributed portions of their wages could elect to withdraw those contributions at any time. *See* Production Employees' Plan, section 3.5. (J.A. 44).[5] Except for their continued right to request return of their own contributions, however, Fort Halifax employees were not entitled to receive any distributions from the retirement plans at the time of the closing of the Winslow plant

[3] Tr. 103. Excerpts from the Production Employees' Plan are contained in the Joint Appendix at 40-67. The complete texts of both plans are contained in the record as exhibits to the federal stipulation which was admitted into evidence at trial. See Tr. 2-3, J.A. 6-9.

[4] Since the plan only credits years of service completed after February 5, 1972, ten years of service is the maximum amount that will be allowed to Fort Halifax employees.

[5] Production employees who annually contributed 5% of their earnings to the retirement plan would be eligible to receive an additional annual amount equaling 1 3/4% of their annual earnings between $6,000 and $20,000 for each year of service. Production Employees' Plan, sections 3.1, 4.1(a) (J.A. 43, 45). The average Fort Halifax production employee earned $10,611.84 in 1980, according to the information contained in Exhibit A to the Supplementary Employee List filed on June 3, 1983 in the trial court. For a production employee whose annual earnings were $10,600, who had ten years of service, and who had contributed 5% of earnings for each of those ten years, the annual retirement benefit would be increased to $1,555.00.

in May of 1981. Under the plans, benefits are payable only when an employee dies or reaches retirement age. *See* Production Employees' Plan, sections 4.5, 5.4, and 6.2. (J.A. 47, 55, 57). Although Fort Halifax now suggests that its employees became eligible for immediate vesting and distribution of plan assets as a result of the plant closing (Appellant's Brief at 3), the record demonstrates only that existing retirement benefits became vested at that time.[6] No distributions were made. Thus, when asked at a deposition in March of 1982 what benefits were being provided to Fort Halifax employees under the pension plans, Fort Halifax vice-president Harvey McGuire responded, "I haven't had anyone die or retire."[7]

C. Proceedings Below

On November 2, 1981 the Director of Maine's Bureau of Labor commenced an action against Fort Halifax to enforce the severance pay law. (J.A. 4-5). That action, filed on behalf of all of the Fort Halifax employees pursuant to 26 M.R.S.A. § 625-B(5), subsumed an action filed several days previously by eleven individual employees, *Bourgoin, et al. v. Fort Halifax Packing Co.*, Docket No. CV-81-515 (Maine Superior Court, Kennebec County), and the two cases were eventually consolidated.

Fort Halifax thereafter answered and raised numerous defenses, alleging that the severance pay law was in-

[6] Tr. 76. Under the terms of the plans, it further appears that such vesting could only have resulted because Fort Halifax exercised its right to terminate the plans as of the date of the plant closing. *See* Production Employees' Plan, sections 11.1 and 11.2 (J.A. 60).

[7] Deposition of Harvey McGuire, Jr. taken on March 24, 1982, at p. 34. *See also* Tr. 98.

applicable on various grounds, that it unconstitutionally impaired the obligation of contracts, that it was being applied retroactively in violation of due process, and that it was preempted by ERISA. See Appendix to Jurisdictional Statement ("J.S. App.") at A69-72.

On October 29, 1982, ruling on cross motions for summary judgment, the Maine Superior Court issued an opinion and order rejecting Fort Halifax's various challenges to the applicability and validity of the statute. (J.S. App. at A30-43). In particular, the court rejected Fort Halifax's argument that the Maine severance pay law was preempted by ERISA:

> The subject targeted in ERISA is the employer-employee relationship as expressed in private benefit plans, not state statutes enacted pursuant to the police power to alleviate the impact of job termination. 29 U.S.C. § 1003(a). The severance pay provisions of 26 M.R.S.A. § 625-B are not employee benefit plans as defined in 29 U.S.C. § 1002. These provisions are not "plans" and are not "established or maintained" by an "employer" or an "employee organization." . . .

(J.S. App. at A34-35). The Superior Court granted partial summary judgment against Fort Halifax on the issue of liability, noting that a further determination was necessary as to the specific employees entitled to receive severance pay and the amount of severance pay that those employees should receive. (J.S. App. A42).[8]

[8] At the same time, the Superior Court granted leave to add Corbett Enterprises as a party but dismissed the State's claim against Corbett Brothers, a subsidiary of Fort Halifax that did not employ 100 persons. (J.S. App. A32-33, A39). Corbett Enterprises was later dismissed by consent of all parties.

Thereafter Fort Halifax filed another motion for summary judgment on the ground, *inter alia,* that the severance pay statute was preempted by the National Labor Relations Act (NLRA). That motion was denied on March 18, 1983 without opinion. (*See* J.S. App. A23).[9] The parties then reached an agreement on the eligibility and amounts owed to the specific Fort Halifax employees, with the exception of some 30 employees whose eligibility was disputed and as to which Fort Halifax contended a trial was necessary. After various continuances, a one-day trial on the remaining issues was held by the Superior Court on April 1, 1985.

A month later the Superior Court issued an order and judgment finding in favor of the State except with respect to a handful of employees. (J.S. App. A21-29). At the outset, the court noted that Fort Halifax had renewed its arguments that the severance pay law was preempted by ERISA and by the NLRA and was otherwise unconstitutional. However, it added that even if the law of the case doctrine did not stand as an obstacle to reopening those issues, "this Court is unpersuaded by defendant's arguments

[9] In the meantime, Corbett Enterprises and Fort Halifax had attempted to remove the case to the U.S. District Court for the District of Maine and had simultaneously filed a separate federal action seeking declaratory and injunctive relief against enforcement of the severance pay law. *Corbett Enterprises, Inc., et al. v. Ewing,* Civil Action No. 83-0020-B (D. Me). By order filed February 16, 1983, the U.S. District Court remanded the instant case as having been removed improvidently and without jurisdiction since no federal question appeared on the face of the complaint. The federal lawsuit filed by Corbett Enterprises and Fort Halifax remained pending but was eventually dismissed on October 3, 1986 on grounds of *res judicata* and abstention. At that time the District Court observed that the issues would ultimately be resolved by the pending appeal to this Court.

on unconstitutionality and preemption." (J.S. App. A23). The Superior Court's judgment awarded severance pay to 85 specified former employees of Fort Halifax. (J.S. App. A26-29). The average amount of severance pay awarded per employee was $2,611.76.

Fort Halifax then appealed to the Maine Supreme Judicial Court, raising various challenges to the severance pay law, including its preemption arguments, and alleging that the Superior Court had also committed various procedural errors. In an opinion issued on June 2, 1986 the Maine Supreme Judicial Court rejected Fort Halifax's challenges to the statute and affirmed the judgment with minor modifications. (J.S. App. A1-20). On the subject of ERISA preemption, the Supreme Judicial Court concluded that the severance pay statute "does not affect employee benefit plans that are within ERISA's regulatory reach." (J.S. App. A7). It found that the severance pay liability created by the statute is not a plan created by an employer or employee organization but a state benefit created as an exercise of the police power for the purpose of dealing with the economic dislocation that accompanies the shutdown of large industrial or commercial facilities. (J.S. App. A8). The court added that under the express contract exception contained in 26 M.R.S.A. § 625-B(3)(B), the severance pay law would generally be inoperative whenever there was a private employee benefit plan providing severance pay, thus eliminating any overlap between ERISA and the Maine severance pay statute. (J.S. App. A8-9).

On the subject of NLRA preemption, the Maine Supreme Judicial Court observed that "state laws of general application that impose minimal substantive requirements on contract terms are not preempted." (J.S. App. A10, *cit-*

ing Metropolitan Life Ins. Co. v. Massachusetts, 105 S.Ct. 2380 (1985)). The court found that Maine's severance pay law was a legitimate exercise of the State's police power, that it affected union and nonunion employees equally, and that it did not limit the rights of self-organization or interfere with the collective bargaining process under the NLRA. Accordingly, the court held that the severance pay law was not preempted under the doctrine of NLRA preemption derived from *Machinists v. Wisconsin Employment Relations Commission,* 427 U.S. 132 (1976). (J.S. App. A11-12).[10]

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SUMMARY OF ARGUMENT

Contrary to the argument made by Fort Halifax, "the preemptive scope of ERISA is neither all-encompassing . . . nor unlimited." *Rebaldo v. Cuomo,* 749 F.2d 133, 138 (2d Cir. 1984), *cert. denied,* 105 S.Ct. 2701 (1985) (citations omitted). While it is not disputed that Congress intended ERISA to occupy the field, the specific field which ERISA occupies is the field of private employee benefit plans. *See* 29 U.S.C. §§ 1001(a), 1002(1), 1002(2), 1003(a). In consequence, ERISA's preemption provision supersedes state laws "only insofar as they relate to plans covered by ERISA." *Shaw v. Delta Air Lines, Inc.,* 463 U.S. 85, 97 n.17 (1983).

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10 The court also noted that the severance pay law did not implicate the other doctrine of NLRA preemption derived from *San Diego Building Trades Council v. Garmon,* 359 U.S. 236 (1959), but that even if it did, the law would be saved from preemption because it reflected a substantial or deeply-rooted State interest. (J.S. App. A14, citing *Farmer v. United Brotherhood of Carpenters,* 430 U.S. 290 (1977)).

In this case the only private employee benefit plans established or maintained by Fort Halifax are its retirement plans. Those plans have not been altered or affected in any way by the Maine severance pay statute. As a result, the Maine severance pay statute does not relate to any existing ERISA-covered plan in this case. Fort Halifax contends, however, that the Maine statute is nevertheless preempted because it creates a statutory ERISA plan of its own.

This argument is untenable for several reasons. First, the Maine statute does not require employers to maintain any plan because it expressly defers to any private severance pay agreement that may be reached between employer and employee. 26 M.R.S.A. § 625-B(3)(B). Indeed, although the agreement in question never took effect, Fort Halifax and its employees reached an agreement covering severance pay in connection with the proposed reopening of the plant in this case. Second, the Maine statute lacks the essential elements of an ERISA plan. Thus, the Maine statute does not require an employer to maintain an ongoing program of benefits and has none of the statutory attributes of an ERISA plan. Most importantly, the Maine statute neither constitutes nor creates a plan that is "established or maintained by an employer or by an employee organization." 29 U.S.C. § 1002(1), 1002(2). *See* 29 U.S.C. § 1003(a). This is crucial because a fundamental purpose of ERISA was to prevent abuses in privately administered plans, and no potential for such abuse exists with respect to a statutory obligation administered by the State.

Moreover, if the Maine severance pay statute is preempted because it is deemed to require employers to maintain an ERISA-covered plan, then it would be preempted even in the case of employers who have no pension plan or

employee benefit plan of any kind. Such employers are not subject to any regulation under ERISA. Nevertheless, under the theory offered by Fort Halifax, those employers would nevertheless be able to take advantage of ERISA preemption to escape their obligations under Maine law. Nothing in the ERISA statute or its legislative history warrants this result.

Given that the Maine statute has none of the essential attributes of an ERISA-covered plan, the argument for preemption reduces to the claim that ERISA precludes states from mandating any employee benefits that might be included in an ERISA plan. The answer to this argument is that Congress intended ERISA to regulate the field of "employee benefit plans," *not* the entire field of "employee benefits." 29 U.S.C. § 1144(a) thus preempts State laws only insofar as they relate to ERISA-covered "plans," and it does not reach the Maine severance pay statute in this case.

Even assuming, however, that a contrary conclusion were reached and the Maine severance pay statute were somehow found to relate to an ERISA-covered plan, the Maine statute would nevertheless escape preemption because of the exception for state unemployment compensation laws. *See* 29 U.S.C. §§ 1003(b)(3), 1144(a). The legislative history of the severance pay statute and the decisions of the Maine courts establish that the severance pay law was designed to respond to the "unemployment crisis" caused by a major plant closing. *Shapiro Bros. Shoe Co. v. Lewiston Auburn Shoeworkers Protective Assn.*, 320 A.2d 247, 254-55 (Me. 1974). While the severance pay statute is

not a traditional form of unemployment compensation law, this does not disqualify it from the exception to ERISA preemption under § 1003(b)(3). *See Metropolitan Life Insurance Co. v. Massachusetts,* 105 S.Ct. 2380, 2390 (1985) (neither ERISA statute nor its legislative history draws any distinction between traditional and non-traditional insurance laws for purposes of the insurance exception to ERISA preemption).

Finally, although Fort Halifax advances the alternative claim that the Maine severance pay statute is preempted by the National Labor Relations Act, this argument is foreclosed by *Metropolitan Life Ins. Co. v. Massachusetts,* 105 S. Ct. at 2393-99. *Metropolitan Life* ruled that the NLRA does not preempt a state from imposing substantive terms on the employment relationship through legislation establishing minimum labor standards. Like the Massachusetts statute at issue in *Metropolitan Life,* the Maine severance pay statute is not addressed to the collective bargaining process and does not regulate the economic weapons available to combatants in a labor dispute. Instead, it requires that union and non-union employees receive a specific benefit under certain circumstances. As a result, it falls within the category of legislation establishing "minimum labor standards" as that term is used in *Metropolitan Life,* 105 S.Ct. at 2397.

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ARGUMENT

I. The Maine Severance Pay Law Is Not Preempted by ERISA Because It Does Not Relate to an ERISA-Covered Plan

The doctrine of preemption is based upon the Supremacy Clause, which invalidates state laws that "interfere with, or are contrary to the laws of Congress." *Gibbons v. Ogden,* 22 U.S. (9 Wheat.) 1, 211 (1824). Preemption exists only when there is a conflict between state and federal regulations or when Congress has intended to displace state law, either expressly or by implication. *Florida Lime & Avocado Growers, Inc. v. Paul,* 373 U.S. 132, 141-42 (1963). The presumption is against preemption. *Jones v. Rath Packing Co.,* 430 U.S. 519, 525 (1977). As this Court has emphasized, "Preemption of state law by federal statute or regulation is not favored in the absence of persuasive reasons—either that the nature of the regulated subject matter permits no other conclusion, or that Congress has unmistakably so ordained." *Chicago & North Western Transportation Co. v. Kalo Brick & Tile Co.,* 450 U.S. 311, 317 (1981). *Accord, Alessi v. Raybestos-Manhattan, Inc.,* 451 U.S. 504, 522 (1981); *Florida Lime & Avocado Growers, Inc. v. Paul,* 373 U.S. at 142.

In this case the issue is whether the Maine severance pay statute is nullified by the express preemption provision contained in the Employee Retirement Income Security Act of 1974 (ERISA). As discussed below, neither the language of the ERISA statute nor its underlying policies support a finding of preemption in this case.

A. By Its Express Terms, ERISA Preempts State Laws Only Insofar as Such Laws Relate to Employee Benefit Plans Covered by ERISA

The entire focus of ERISA is on privately-created and privately-administered employee benefit plans. An employee benefit plan covered by ERISA is defined as a "plan, fund or program . . . established or maintained by an employer or by an employee organization" for the purpose of providing certain benefits. 29 U.S.C. §§ 1002(1), (2). Under the statute such plans are divided into two categories: "employee pension benefit plans" and "employee welfare benefit plans." *See* 29 U.S.C. §§ 1002(1), (2), (3). Employee pension benefit plans provide for retirement or deferred income. 29 U.S.C. § 1002(2). Employee welfare benefit plans provide medical, accident, unemployment, and other non-pension fringe benefits. 29 U.S.C. § 1002(1).[11]

The ERISA statute creates detailed reporting, disclosure, and fiduciary responsibilities that are applicable to both pension and welfare benefit plans. 29 U.S.C. §§ 1021-31, 1101-14. In addition, it mandates specific participation, vesting, and fiduciary requirements for pension plans and establishes a system of insurance to protect the rights of pensioners in the event of a pension plan termination. 29 U.S.C. §§ 1051-86, 1301-68. In enacting these provisions, Congress had two basic purposes. The first was to prevent abuses in privately-administered employee benefit plans. *Massachusetts Mutual Life Ins. Co. v. Russell,*

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[11] Because 29 U.S.C. § 1002(1) incorporates by reference "any benefit described in 29 U.S.C. 186(c)," severance benefits are included within the various fringe benefits that may be offered by an ERISA-covered welfare plan.

105 S.Ct. 3085, 3090 n.8 (1985); *Donovan v. Dillingham,* 688 F.2d 1367, 1370 (11th Cir. 1982) (en banc); *Wadsworth v. Whaland,* 562 F.2d 70, 73-74 (1st Cir. 1977), *cert. denied,* 435 U.S. 980, 981 (1978). The second was to ensure that upon retirement, workers actually received the pension benefits they had been promised. *Nachman Corp. v. Pension Benefit Guaranty Corp.,* 446 U.S. 359, 374-75 (1980).

Like the ERISA statute itself, ERISA's preemption section focuses on private employee benefit plans. Specifically, it preempts "any and all State laws insofar as they may now or hereafter relate to any employee benefit plan" covered by ERISA. 29 U.S.C. § 1144(a). Thus, the key to preemption is whether a state law relates to an ERISA-covered plan, not whether it relates to any benefit that might be offered by an ERISA-covered plan. In other words, although severance pay may be among the benefits provided by an ERISA-covered plan, this does not mean that all state laws relating to severance pay are automatically preempted. Moreover, even where state laws do relate to ERISA-covered plans, 29 U.S.C. § 1144(a) does not preempt such state laws in their entirety but only "insofar as" those laws actually relate to ERISA-covered plans.

B. In This Case the Maine Statute Does Not Relate to Any Existing ERISA-Covered Plan

In this case, the only private employee benefit plans established or maintained by Fort Halifax were its retirement plans. Those plans have not been altered or affected in any way by the Maine severance pay law. The rights and obligations of Fort Halifax and its employees under the retirement plans, the assets and liabilities of those

plans, the administration of those plans, and the terms and conditions of those plans all remain unchanged. As a result, the Maine severance pay law cannot be found to relate to any existing ERISA plan in this case.

Indeed, Fort Halifax does not argue that the Maine severance pay law relates to its existing retirement plans. Instead, Fort Halifax suggests that the Maine severance pay law relates *generally* to ERISA-covered plans "because statutory liability can be avoided only if the employer adopts a private [severance] plan." (Appellant's Brief at 6; see *id.* at 15-16). In other words, it contends that the Maine law "relates" to an ERISA-covered plan because, under the express contract exception in 26 M.R.S.A. § 625-B(3)(B), the law is *inapplicable* if an employer has an ERISA severance plan. This argument, once stated, refutes itself. In *Shaw v. Delta Air Lines, Inc.,* 463 U.S. 85, 100 n.21 (1983), this Court pointed out that some state laws "may affect employee benefit plans in too tenuous, remote or peripheral a manner to warrant a finding that the law 'relates to' the plan." It is difficult to imagine a law which could affect an ERISA-covered plan in any more tenuous a manner than a law which does not apply in the presence of such a plan.

In fact, the "express contract" exception to the severance pay statute demonstrates that the Maine statute does not relate to private severance pay plans since it expressly preserves the freedom of employers and employees to enter private arrangements on the subject of severance. Under this provision employers can contract with their employees either to reduce the amount of severance pay owed or to eliminate severance pay entirely. Indeed, although the agreement in question never took effect, Fort Halifax entered into just such an agreement

in connection with the proposed reopening of the plant in the instant case. (See J.A. 36-38). Thus, the only conceivable overlap between ERISA and the severance pay statute is in the case (not presented here) where private severance pay arrangements exist, and this overlap is largely eliminated by "express contract" exception in 26 M.R.S.A. § 625-B(3)(B).[12]

C. The Severance Pay Statute Does Not Itself Create An ERISA-Covered Plan

The principal argument advanced by Fort Halifax is that, although the Maine severance pay statute does not relate to any private ERISA plan in this case, the statute itself creates an ERISA-covered plan and requires employers to maintain such a plan. At the outset, however, the Maine statute does not "require" employers to maintain any plan because, as noted above, the statute expressly preserves private arrangements on the subject of severance pay, including agreements to eliminate severance pay entirely. Moreover, the theory that the Maine statute

[12] The amicus brief of the Chamber of Commerce argues that there would still be a conflict between ERISA and the Maine severance pay law in the hypothetical case of an employer who has an ERISA-covered severance plan but whose plan would not qualify as an express contract under 26 M.R.S.A. § 625-B(3)(B). See Chamber of Commerce Amicus Brief at 10-11. In that situation—absent special circumstances and assuming that the Maine statute is not otherwise exempt from preemption as a form of unemployment compensation law (see pp. 30-33 below)—the Maine statute would be required to yield to ERISA. Unlike the hypothetical employer suggested by the Chamber of Commerce, however, Fort Halifax did not have an ERISA-covered severance pay plan in this case and accordingly, no such conflict is presented here.

creates an ERISA plan cannot withstand scrutiny for several fundamental reasons.

First, this theory ignores the fact that in enacting ERISA, Congress was focusing on employee benefit plans that were privately created and privately administered. The requirement that an ERISA-covered plan must be "established or maintained by an employer or by an employee organization" is contained in ERISA's definitional sections, 29 U.S.C. §§ 1002(1) and (2), and is reiterated in the section which sets forth the limits of ERISA's coverage. 29 U.S.C. § 1003(a). The same requirement was specifically noted in the legislative history of the ERISA preemption section.[13]

In contrast, the Maine severance pay statute is not a private employee benefit plan established or maintained by an employer or union; it is an independent statutory obligation established and administered by the State. This point is crucial because, as noted above, a fundamental purpose of ERISA was to prevent abuses in privately-administered plans. *E.g., Massachusetts Mutual Life Ins. Co. v. Russell*, 105 S.Ct. at 3090 n.8 ("the crucible of congressional concern was misuse and mismanagement of

[13] Both the Senate and House conference reports state that under the conference substitute for the preemption provision, which was thereafter enacted as 29 U.S.C. § 1144(a), "the provisions of [ERISA] title I are to supercede all state laws that relate to any employee benefit plan that is established by an employer engaged in or affecting interstate commerce or by an employee organization that represents employees engaged in or affecting interstate commerce." H.R. Rep. No. 93-1280, 93d Cong., 2d Sess. 383 (1974), reprinted in 3 [1974] U.S. Code Cong. & Admin. News 5038, 5162; S. Rep. No. 93-1090, 93d Cong., 2d Sess. 383 (1974).

plan assets''); *Donovan v. Dillingham*, 688 F.2d at 1370 (''Congress enacted ERISA to protect working men and women from abuses in the administration and investment of private retirement plans and employee welfare plans''). No potential for such abuse exists with respect to a statutory obligation administered by a state agency.

Second, the Maine severance pay law lacks another essential element of an ERISA plan in that it does not create an ongoing program of benefits but merely imposes a one-time obligation in the event of a plant shutdown. While Congress did not define what it meant by a ''plan, fund, or program'' as used in 29 U.S.C. §§ 1002(1) and (2), the overall structure of the ERISA statute demonstrates that it contemplated an ongoing program of benefits in order for the reporting and fiduciary requirements of ERISA to apply. *See, e.g.*, 29 U.S.C. §§ 1023, 1103, 1106-07. A lump sum payment of benefits on a single occasion is not sufficient to constitute an ERISA plan. *Martori Bros. Distributors v. James-Massengale*, 781 F.2d 1349, 1358, *amended on other grounds*, 791 F.2d 799 (9th Cir. 1986), *cert. denied*, 107 S.Ct. 435, 670 (1986) (''It is difficult to see how the making of one-time lump sum payments could constitute the establishment of a plan''). *See Scott v. Gulf Oil Corp.*, 754 F.2d 1499, 1504 (9th Cir. 1985). Accordingly, the Maine severance pay law does not qualify as an ERISA plan because it is a one-time statutory assessment that applies only in the event of

a plant closing and does not create an ongoing benefit program.[14]

Furthermore, in enacting ERISA, Congress viewed ''plans'' as entities that were separate and distinct from the employers who established them. *See, e.g.*, 29 U.S.C. § 1001(a).[15] It provided that such ''plans'' could sue and be sued as entities in their own right and that only the ''plan'' (and not the employer) would be liable for the payment of benefits. 29 U.S.C. §§ 1132(d)(1), (2). This is part of an overall scheme which requires that plan assets be held in trust and that they be managed by persons who are expressly designated as fiduciaries. 29 U.S.C. §§ 1102-03. The Maine severance pay statute, in contrast, does not require the creation of any trust fund or other separate entity but constitutes a liability assessed against an employer's general assets. Thus, the severance pay statute has none of the essential attributes of an ERISA-covered plan.

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[14] The amicus brief of the United States suggests that this analysis is inconsistent with the fact that death benefits are among the benefits that may be provided by an ERISA-covered plan, 29 U.S.C. § 1002(1). (Amicus Brief of the United States at 17). This misses the point. While death benefits generally involve a one-time payment as far as each beneficiary is concerned, the payment of death benefits to various beneficiaries over time nevertheless constitutes an ongoing program of benefits. In contrast, a one-time statutory assessment payable to eligible employees upon a single occasion (a plant closing) does not constitute an ongoing program of benefits.

[15] 29 U.S.C. § 1001, which consists of the Congressional findings and declaration of policy for the ERISA statute, is notably absent from the statutory provisions which are reproduced in the Appendix to Appellant's Jurisdictional Statement. For the convenience of the Court, it is reproduced as an Appendix to this brief.

The cases relied upon by Fort Halifax are not to the contrary. In *Gilbert v. Burlington Industries, Inc.*, 765 F.2d 320 (2d Cir. 1985), *aff'd mem.*, 106 S.Ct. 3267 (1986), and *Holland v. Burlington Industries, Inc.*, 772 F.2d 1140 (4th Cir. 1985), *aff'd mem.*, 106 S.Ct. 3267 (1986), this Court summarily affirmed decisions holding that ERISA applied to an employer's informal severance pay policy even though that policy was unfunded and benefits were payable only out of an employer's general assets. Those cases, however, involved an informal severance pay policy that was privately initiated and privately administered. As numerous courts have held, ERISA must be found to cover such arrangements because the alternative would be to allow employers to circumvent ERISA by maintaining informal plans that did not comply with ERISA requirements. *E.g., Scott v. Gulf Oil Corp.*, 754 F.2d at 1503; *Blau v. Del Monte Corp.*, 748 F.2d 1348, 1352 (9th Cir. 1985), *cert. denied*, 106 S.Ct. 183 (1986); *Donovan v. Dillingham*, 688 F.2d at 1372; *Dependahl v. Falstaff Brewing Corp.*, 491 F.Supp. 1188, 1195 (E.D.Mo. 1980), *aff'd*, 653 F.2d 1208 (8th Cir.), *cert. denied*, 454 U.S. 968 (1981).[16] The same concern was expressed by the Second Circuit in *Gilbert*. *See* 765 F.2d at 328-29.

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[16] Both Fort Halifax and amici rely upon the discussion of an ERISA "plan" contained in *Donovan v. Dillingham*, 688 F.2d at 1373. In that case, the Eleventh Circuit was attempting to determine whether employers who purchase group health insurance through a multiple employer trust could thereby be found to have established an ERISA-covered "plan." If not, they would have escaped regulation under ERISA. *Donovan's* definition of an ERISA "plan" in that context simply has no relevance to the entirely different issue in the case at bar. Significantly, *Donovan* rejected the Secretary of Labor's contention that any decision to provide a benefit listed in 29 U.S.C. § 1002 (1) constituted the establishment of an ERISA-covered plan. 688 F.2d at 1372-73.

This logic, however, does not justify the extension of ERISA to cover Maine's severance pay statute. Unlike an informal benefit policy maintained by an employer—which is subject to precisely the kind of abuses which ERISA was designed to prevent—the severance pay statute creates a formal statutory obligation which is fully disclosed to employees, which is administered by a state agency, and which is not subject to manipulation by employers. As a result, the protections of ERISA are unnecessary, and the *Gilbert* line of cases thus does not support the argument that the Maine severance pay statute "creates" an ERISA-covered plan.[17]

In arguing that the Maine severance pay statute is nevertheless preempted because it creates an ERISA-covered plan, both Fort Halifax and amici rely upon *Standard Oil Co. v. Agsalud*, 442 F.Supp. 695 (N.D. Cal. 1977), *aff'd*, 633 F.2d 760 (9th Cir. 1980), *aff'd mem.*, 454 U.S. 801 (1981). The *Agsalud* case, however, differs from this

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[17] *Gilbert* and *Holland* are distinguishable in other important respects as well. Those cases involved an established and ongoing severance pay policy applicable to all employees. In contrast, as noted above, the severance pay law constitutes a one-time statutory assessment applicable only in the event of a plant closing and does not create an ongoing benefit plan subject to ERISA. In addition, both *Gilbert* and *Holland* were cases where the employees had asserted both ERISA claims and claims under state law. Since the employer's private severance pay policy was found to constitute an ERISA-covered plan and since regulation under ERISA is exclusive, the employees' state law claims were preempted. In the instant case, unlike *Gilbert* and *Holland*, the Fort Halifax employees cannot be relegated to their remedies under ERISA because no ERISA remedies are available, and their only recourse is under the Maine severance pay law. *See Scott v. Gulf Oil Corp.*, 754 F.2d at 1505-06 (ERISA preemption not applied where plaintiffs would be left without any avenue of redress).

case for several fundamental reasons. First, the Hawaii statute at issue in *Agsalud* required employers to establish a comprehensive health care plan. Such a plan, which had all of the attributes of an ERISA-covered plan, necessarily constituted the kind of ongoing benefit program contemplated by ERISA. In addition, the health care plan in question was to be privately administered. This meant that, although required by the State, the plan was nevertheless "maintained" by employers and thus met the statutory requirement that an ERISA-covered plan be "established or maintained" by an employer or union. 29 U.S.C. §§ 1002(1), 1002(2), 1003(a). In contrast, Maine's severance pay law imposes a one-time payment in the event of a plant closing; as noted above, it is neither an ongoing program of benefits nor does it have any of the other attributes of an ERISA-covered plan. Moreover, it cannot be said to be "maintained" by an employer or union.

The Hawaii statute at issue in *Agsalud* also related to an ERISA-covered plan in that it imposed certain specifc additional requirements on Standard Oil's existing ERISA plan. Thus, the Hawaii statute specifically required that Standard Oil's ERISA plan include coverage for alcohol and drug abuse; in addition, the Hawaii statute included reporting requirements that differed from those of ERISA. *See* 442 F.Supp. at 696. Indeed, the Hawaii statute could best be described as a "mini-ERISA" statute covering health benefit plans. Unlike Hawaii's Prepaid Health Care Act, the Maine severance pay does not in any way alter or affect the rights or obligations of Fort Halifax under its existing ERISA plans. As a result, the Maine

law does not invade the area regulated by ERISA and is not preempted.[18]

In sum, the theory that the Maine severance pay statute creates an "employee benefit plan" within the meaning of ERISA stretches the concept of an ERISA-covered plan beyond recognition. "[T]o be properly characterized as an ERISA employee benefit plan, a plan must satisfy the definitional requirements of [29 U.S.C. § 1002] in both form and substance." H. Rep. No. 94-1785, 94th Cong., 2d Sess. 48 (1977). The Maine severance pay law satisfies those requirements in neither respect. Moreover, in preemption cases, the intent of Congress is the "ultimate touchstone," *California Federal Savings and Loan Assn. v. Guerra,* 55 U.S.L.W. 4077, 4080 (Jan. 13, 1987),

[18] Fort Halifax and *amici* also rely upon the subsequent Congressional response to the *Agsalud* decision in Pub. L. No. 97-473 § 301, 96 Stat. 211. See Brief for Appellant at 11, 14; Amicus Brief for the United States at 20-22. As this Court has noted, the statements of a subsequent legislature are not a reliable guide to the intent of its predecessors, and such statements are accordingly entitled to little weight. *E.g., Oscar Mayer & Co. v. Evans,* 441 U.S. 750, 758 (1979); *Rainwater v. United States,* 356 U.S. 590, 593 (1958). Indeed, the statement of Representative Erlenborn which Fort Halifax twice quotes (Appellant's Brief at 11, 14) was inserted into the Congressional Record without being spoken on the floor. 128 Cong. Rec. H9609-10 (daily ed., Dec. 13, 1982). In addition, as the United States acknowledges (Amicus Brief for the United States at 21 n.15), the Senate report on Pub.L.No. 97-473 suggests that the Senate Committee in fact disapproved of the result in *Agsalud. See* S. Rep. 97-646, 97th Cong., 2d Sess. 18 (1982) ("The Committee believes that the preemption of the Hawaii Prepaid Health Care Act by ERISA is inadvertent"). Finally, in view of the fundamental differences between the Maine severance pay law and the Hawaii statute at issue in *Agsalud,* neither that decision nor the Congressional response to that decision are in any way dispositive here.

and Congress did not intend to embrace one-time statutory obligations within the category of ERISA-covered plans.[19]

The fallacy of the theory that the Maine law creates an ERISA-covered plan is most clearly demonstrated by the anomalous and illogical results that would follow from acceptance of such a theory. If the severance pay law is preempted because it is deemed to require employers to maintain an ERISA-covered plan, then it would be preempted even with respect to those employers who have no pension plan or employee benefit plan of any kind. Thus, the inevitable result of this argument is that an employer which has no ERISA plan and which is therefore not subject to regulation under ERISA in any way would nevertheless be able to take advantage of ERISA preemption to escape its obligations under the Maine severance pay law. This makes no sense. *See Marcal Paper Mills, Inc. v. Ewing,* 790 F.2d 195, 198 (1st Cir. 1986) (Aldrich, J., concurring).[20]

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[19] Even if the severance pay statute fell within the statutory definition of an ERISA-covered plan—which it does not—"it is a familiar rule, that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit, nor within the intention of its makers." *California Federal Savings and Loan Assn. v. Guerra,* 55 U.S.L.W. at 4080 (quoting other cases).

[20] Marcal involved a federal court challenge to the Maine severance pay law by an employer who had been sued in state court. In the First Circuit, two judges held that because of the pending state court case, the federal action had been properly dismissed under the doctrine of abstention. Judge Aldrich disagreed with his colleagues that abstention was appropriate but nevertheless concurred in the result, based on his view that the ERISA preemption claim should be rejected on the merits. The state's enforcement action against Marcal is still pending in the Maine courts. In that action, as in the First Circuit, Marcal is represented by the same counsel who has filed an amicus brief on behalf of the Chamber of Commerce in this case.

In *Marcal,* an employer who had no employee benefit plan of any kind nevertheless argued that the Maine severance pay statute was preempted by ERISA. Judge Aldrich's response was short and to the point: "I see no merit whatever in appellant's contention that ERISA preempts even when an employer has no plan." He went on to state that since Marcal was not subject to ERISA, it could not use ERISA to avoid the severance pay law: "[A]ppellant cannot have it both ways: no ERISA, and no State statute." 790 F.2d at 198.

D. Contrary to the Arguments Made by Fort Halifax and Amici, Congress Did Not Seek to Occupy the Entire Field of Employee Benefits

Given that the Maine severance pay law has none of the attributes of an ERISA-covered "plan," the argument for preemption reduces to the claim that states are preempted from mandating any of the benefits that might be offered by an ERISA-covered plan. In fact, this is precisely what Fort Halifax contends at pages 16-17 of its Brief. Similarly, the Solicitor General argues that "there is no legally significant distinction between mandating the establishment of a plan and mandating the payment of a benefit." (Amicus Brief for the United States at 14 n.10). The short answer to the argument is that Congress intended ERISA to regulate the field of employee benefit plans, *not* the entire field of employee benefits. Thus, 29 U.S.C. § 1144(a) does not preempt any and all state laws relating to "employee benefits." Nor does it preempt state laws relating to "employee benefits that would be eligible for inclusion in an ERISA-covered plan." Instead, it preempts state laws "only insofar as they relate to *plans* covered by ERISA." *Shaw v. Delta Air Lines, Inc.,* 463 U.S. 85, 97 n.17 (1983) (emphasis added).

The findings and declaration of policy contained in the ERISA statute, 29 U.S.C. § 1001(a), demonstrate beyond dispute that the institution which Congress was intending to regulate was the private employee benefit plan. This is further confirmed by the legislative history of the preemption provision itself.[21] There is absolutely no evidence in the ERISA statute or its legislative history to suggest that at the same time that Congress enacted ERISA to regulate private employee benefit plans, it also sought to federalize the entire field of employee benefits. As the Ninth Circuit stated in *California Hospital Assn. v. Henning*, 770 F.2d 856, 861 (9th Cir. 1985), *amended on other grounds*, 783 F.2d 946 (9th Cir. 1986), *cert. denied*, 106 S.Ct. 3273 (1986), "Federal exclusivity [under ERISA] is a corollary of regulatory coverage, not an independent statutory goal." ERISA thus does not preclude the states from regulating the subject of employee benefits except insofar as such regulation relates to an ERISA-covered plan.

Moreover, the Maine statute at issue in this case is not intended to regulate employee benefits *per se*. Instead, it constitutes Maine's attempt to respond to the specific problem of plant closings, a problem which is particularly acute in those Maine towns where one plant is the dominant employer. While Maine is currently the only state with a severance pay statute, this does not in any way support the

[21] *See* 120 Cong.Rec. 29197 (statement of Rep. Dent that ERISA reserves to federal authority the sole power to regulate "the field of employee benefit plans"); *id.* at 29933 (statement of Sen. Williams that preemption provision was designed to eliminate the threat of conflicting or inconsistent state and local regulation of "employee benefit plans"); *id.* at 29942 (statement of Senator Javits that ERISA is intended to displace state action "in the field of private employee benefits programs").

argument for preemption. To the contrary, as Justice Brandeis originally pointed out, it is part of the genius of the federal system that a single state may serve "as a laboratory [for] novel social and economic experiments without risk to the rest of the country." *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932). Unless the Maine statute invades the area of exclusive federal regulation under ERISA, therefore, it may not be sacrificed in the name of national uniformity.

In this case, as shown above, the severance pay statute does not fall within the scope of ERISA's express preemption provision, nor do the policies underlying ERISA justify the extension of preemption in this situation. If the presumption against preemption in the absence of a clear expression by Congress is to have any meaning,[22] then the severance pay statute—which does not affect the existing retirement plans maintained by Fort Halifax and which does not create the kind of private employee benefit plan which Congress was intending to regulate under ERISA—cannot be found to be preempted in this case. Indeed, since a primary purpose of ERISA was to *protect* the benefit rights of employees, *e.g., Nachman Corp. v. Pension Benefit Guaranty Corp.*, 446 U.S. at 374-75, it would be both ironic and unfortunate if employers like Fort Halifax were able to invoke ERISA in order to avoid their obligations to their employees under Maine law.

[22] *See New York Department of Social Services v. Dublino*, 413 U.S. 405, 413 (1973), *quoting Schwartz v. Texas*, 344 U.S. 199, 202-03 (1952).

II. The Severance Pay Statute is Not Preempted By ERISA Because It is a Form of Unemployment Compensation Law

Aside from the fact that the Maine severance pay law does not relate to any ERISA-covered benefit plan, it is also exempt from preemption under ERISA for another reason. ERISA does not cover an employee benfit plan that "is maintained solely for the purpose of complying with applicable . . . unemployment compensation laws," 29 U.S.C. § 1003(b)(3), and accordingly state laws relating to such a plan are not preempted. 29 U.S.C. § 1144(a). Even assuming, therefore, that the Maine severance pay statute could somehow be found to create an "employee benefit plan" within the meaning of 29 U.S.C. § 1002(3), it would not be subject to preemption because it constitutes a form of unemployment compensation law.

In 1974, considering a predecessor of the existing severance pay law, the Maine Supreme Judicial Court recognized that its purpose was "to combat the unemployment crisis created when a large firm voluntarily shuts down on on short notice." *Shapiro Bros. Shoe Co. v. Lewiston-Auburn Shoeworkers Protective Assn.*, 320 A.2d at 255. It recognized that the statute was designed both "to ameliorate the effect on a community when a large employer voluntarily goes out of business" and "to enable the affected worker to seek new employment, knowing that in the meantime he would receive at least some compensation after suddenly finding himself without work." *Id.* at 254. It also noted that the statute focused on those employers "most able to prevent the side effects of sudden unemployment." *Id.* at 256.

The version of the severance pay law that was considered by the Maine courts in the *Shapiro Bros.* case required severance pay only where an employer did not give 30 days notice of its intent to close a plant. 1971 Me. Laws, ch. 452. In 1973 this law was amended to require severance pay regardless of notice. 1973 Me. Laws, ch. 545. The sponsor of the 1973 amendment argued that this would not only assist employees but also would help the vast majority of employers by taking pressure off the state unemployment compensation fund and thereby holding down the rate of employer contributions. 1973 Maine Legis. Record 4093 (statement of Rep. Farley). He added that if a worker received 20 weeks of severance pay under the proposed amendment, that worker should not be able to seek unemployment compensation until the 20 weeks had gone by. *Id.* at 4094.[23] The legislative history of the 1973 amendment thus reemphasizes that the Maine Legislature regarded severance pay as a form of unemployment compensation.[24]

Obviously, the Maine severance pay statute is not a traditional form of unemployment compensation law. For example, it is not required under the statute that an employee remain unemployed in order to receive statutory

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[23] Contrary to the intent of the sponsor of the 1973 amendment to the severance pay law, however, the Maine Bureau of Employment Security has not treated the receipt of 20 weeks of severance pay as a disqualification for unemployment compensation until the full 20 weeks have passed.

[24] Although the law was subsequently amended, *see* 1975 Me. Laws, ch. 512, the modifications made in the law at that time did not change its basic concept.

severance pay.[25] This does not mean, however, that the severance pay statute is any less of an unemployment compensation law for purposes of ERISA preemption. As the Maine Supreme Judicial Court observed in the *Shapiro Bros.* case, "while the most common form of unemployment relief—the payment of benefits—follows the onset of the condition, not all legislative attempts to deal with these problems must take effect after the fact." 320 A.2d at 255. As the legislative history and the *Shapiro Bros.* case demonstrate, the severance pay law was in fact designed to respond to an "unemployment crisis." *Id.* And the reality is that a major plant closing in a small Maine town *is* an unemployment crisis. In such a situation, many workers will remain unemployed long after their traditional unemployment benefits have been exhausted.

In *Metropolitan Life Insurance Co. v. Massachusetts*, 105 S.Ct. 2380 (1985), which involved ERISA's express exception from preemption for the state laws regulating insurance, *see* 29 U.S.C. § 1144(b)(2)(A), the insurer ar-

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[25] In this connection, however, it should be noted that the trial court in this case ruled that four employees who transferred directly to another employer with no loss of pay were not eligible for severance pay because they had not suffered any "severance." (J.S. App. A24).

In its amicus brief, the United States points out that for purposes of unemployment compensation, Maine law currently defines wages to include severance pay, 26 M.R.S.A. § 1043 (19), leading in some cases to an increase of unemployment compensation as a result of the receipt of severance pay. However, this resulted from a 1985 amendment to the definition of wages, 1985 Me. Laws ch.348, which postdated the closing of the Fort Halifax plant by four years. More importantly, 26 M.R.S.A. § 1193(5) has consistently disqualified an employee who is receiving "terminal pay" (which includes severance pay) from unemployment compensation.

gued that certain provisions of the Massachusetts insurance laws were nevertheless preempted because they were not the kind of "traditional" insurance laws intended to fall within the insurance exception. This Court rejected that argument, noting that neither the ERISA statute nor its legislative history purported to draw any distinction traditional and innovative insurance laws. 105 S.Ct. at 2390. Similarly, we are aware of no basis in the ERISA statute or its legislative history for drawing any distinction between traditional and nontraditional unemployment compensation laws.

Accordingly, even if the definition of an employment benefit plan covered by ERISA could be stretched so far out of shape that it covered the Maine severance pay statute, the latter would still be saved from preemption under the exception for unemployment compensation laws. On this issue the cases relied upon by Fort Halifax support the State's position in that they find that severance pay is an unemployment benefit. *E.g., Gilbert v. Burlington Industries, Inc.*, 765 F.2d at 325. While preemption was found in *Gilbert*, the employee benefit plan at issue in that case was not established solely to comply with applicable state unemployment compensation laws. In this case, however, *if* the Maine severance pay law is somehow found to create an ERISA-covered employee benefit plan (a premise we do not accept for the reasons stated above), such a plan would exist solely to comply with 26 M.R.S.A. § 625-B. Since § 625-B is a form of unemployment com-

pensation law, it therefore escapes preemption under 29 U.S.C. § 1003(b)(3).[26]

III. The Maine Severance Pay Statute Is Not Preempted by the National Labor Relations Act

Fort Halifax and the Chamber of Commerce contend that the Maine severance pay law is also preempted by the National Labor Relations Act (NLRA). The United States, in contrast, concludes that this Court's decision in *Metropolitan Life Ins. Co. v. Massachusetts*, 105 S.Ct. at 2393-99, controls here and mandates the conclusion that the Maine severance pay law is not preempted by the NLRA. *See* Amicus Brief for the United States at 8-10 n.6. We agree with the United States.

Although the NLRA contains no express preemption provision, Fort Halifax bases its argument on a line of cases derived from *Machinists v. Wisconsin Employment Relations Commission*, 427 U.S. 132 (1976), holding that states may not regulate the economic weapons available to combatants in labor disputes. *See, e.g., Machinists*, 427 U.S. at 140, 146-48; *Golden State Transit v. City of Los Angeles*, 106 S.Ct. 1395, 1399 (1986). Fort Halifax claims that Congress also intended that the substantive terms of collective bargaining agreements should be left

[26] In this connection, it bears emphasis that disability benefit laws are exempted by the same provision of ERISA that exempts unemployment compensation laws, and in considering the exemption for preemption for disability benefit laws, this Court has stated that "while a state may not require an employer to alter its ERISA plan, it may force the employer to choose between providing disability benefits in a separately administered plan or including the state mandated benefits in its ERISA plan." *Shaw v. Delta Air Lines, Inc.*, 463 U.S. at 108.

unregulated. Accordingly, it argues that since the severance pay law dictates certain terms of its employment relationship with its employees, the law is preempted by the NLRA.

This argument is foreclosed by *Metropolitan Life Insurance Co. v. Massachusetts*, which upheld state laws mandating inclusion of specified benefits in insurance policies purchased by employers. The import of the *Metropolitan* decision is that the NLRA does not preempt a state from imposing substantive employment terms on parties to labor agreements through laws setting minimum labor standards. *See* 105 S.Ct. at 2397-98. Like the Massachusetts statute at issue in *Metropolitan Life*, the Maine severance pay law is not addressed to the collective bargaining process. It merely requires that individual workers be given a specific benefit under certain circumstances. Moreover, unlike the state action at issue in such cases as *Machinists* and *Golden State Transit*, the Maine statute does not regulate the economic self-help weapons available to employers or employees under federal law. As a result, the Maine statute falls within the category of state legislation establishing "minimum labor standards" as that term is used in *Metropolitan Life*. *See* 105 S.Ct. at 2397.

While Fort Halifax contends that the severance pay law in fact interferes with the bargaining process because it strengthens the hand of the union during collective bargaining, the same can be said for any minimum labor standard that guarantees employees a benefit that they no longer need to seek at the bargaining table. Nevertheless, such minimum labor standards were upheld in *Metropolitan*

Life.[27] Similarly, while Fort Halifax argues that the Maine law is preempted because it prevents employers from implementing their last offer on the subject of severance pay if negotiations reach an impasse, the same is true for any state-imposed minimum labor standard. Simply stated, if states are permitted under the NLRA to adopt laws setting minimum labor standards, then employers cannot be free to implement offers which violate those minimum labor standards whenever there is an impasse in negotiations.

In fact, the Maine severance pay law is significantly less intrusive than many state minimum labor standards because it expressly preserves the freedom of employers and employees to contract on the subject of severance pay. 26 M.R.S.A. § 625-B(3)(B). Indeed, Fort Halifax entered into such a contract in November of 1981. Although this contract never took effect, its existence belies any suggestion that the Maine statute inevitably tilts negotiations on severance pay in favor of the union. (*See* Amicus Brief of

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[27] Fort Halifax argues that this case can be distinguished from *Metropolitan Life* because employers in *Metropolitan Life* retained the "unilateral" ability to avoid the coverage of the Massachusetts law by not agreeing to provide health coverage or by self-insuring. Since health coverage is a mandatory subject of collective bargaining, however, it cannot be unilaterally dropped by an employer. Thus, although the parties to a collective bargaining agreement in Massachusetts could drop health coverage by agreement, this is identical to the option to forego severance pay which exists under the "express contract" exception to the Maine severance pay law. Moreover, as this Court noted, the option of self-insurance is only available if the employer is in a financial position to make that choice. 105 S.Ct. at 2394. The *Metropolitan Life* opinion noted that the Supreme Judicial Court of Massachusetts had correctly found that an employer who purchased health insurance had "no choice" but to provide the mandated benefit. *Id.*

Chamber of Commerce at 18). Since the law thus defers to any severance pay contract reached between the parties, it does not "prevent the contracting parties from carrying out their agreement upon a subject matter as to which federal law directs them to bargain." *Teamsters v. Oliver,* 358 U.S. 283, 295 (1959). *See Baltimore v. Ohio Railroad Co. v. Commonwealth of Pennsylvania,* 461 Pa. 68, 334 A.2d 636, 640 (Pa. 1975), *appeal dismissed for want of a substantial federal question,* 423 U.S. 806 (1975).

Fort Halifax also seeks to derive support from NLRA § 8(d), 29 U.S.C. § 158(d), but that section merely provides that an employer is not obliged to agree to any particular contract term during the collective bargaining process. Neither that section—nor the corollary principle that the NLRB cannot require an employer to accept a specific contract term as a remedy for a § 8(d) violation, *see H. K. Porter Co. v. NLRB,* 397 U.S. 99 (1970)—prevents a state from regulating issues subject to collective bargaining by imposing terms on the employment relationship. *See Metropolitan Life,* 105 S.Ct. at 2394, 2397, 2398-99; *Malone v. White Motor Corp.,* 435 U.S. 497, 504-05 (1978).

In an attempt to distinguish *Metropolitan Life,* Fort Halifax claims that the Maine severance pay law does not apply equally to union and non-union employees. This is flatly incorrect. The severance pay law draws absolutely no distinction between union and non-union employees. As demonstrated by the instant case, where at least 10 non-union supervisors were awarded severance pay in the Superior Court judgment,[28] the severance pay statute re-

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[28] These ten are the "administrative employees" referred to in the Superior Court's May 2, 1985 decision. (J.S. App. A25).

quires that both union and non-union employees receive severance pay in the event of a major plant closing.

Fort Halifax apparently premises its claim that the law does not treat union and non-union workers alike on the theory that employers with non-union workers can "unilaterally" avoid their severance pay obligations under the "express contract" exception contained in 26 M.R.S.A. § 625-B(3)(B) and that the law therefore discriminates against unionized employers. We are not so sure that the "express contract" exception necessarily permits such unilateral action. However, the short answer to this claim is that a state law which is even-handed on its face does not become "discriminatory" because it can more easily be avoided in some circumstances than others. And to the extent that Fort Halifax's argument is premised on the truism that non-union employees generally have less bargaining power than union employees, this situation is not peculiar to the Maine severance pay law but applies to all employment-related issues.

Finally, Fort Halifax argues that the Maine severance pay law is not a valid exercise of police power. However, the severance pay law has twice been upheld by Maine's highest court as a valid exercise of police power aimed at the severe problems caused by major plant closings. *See* J.S. App. A11; *Shapiro Bros. Shoe Co. v. Lewiston-Auburn Shoeworkers Protective Assn.*, 320 A.2d at 254-55. This is plainly permitted by the NLRA, under which states retain "broad authority . . . to regulate the employment relationship to protect workers within the state." *Metropolitan Life*, 105 S.Ct. at 2398, quoting *DeCanas v. Bica*, 424 U.S. 351, 356 (1976).[29]

Thus, all of Fort Halifax's purported distinctions between this case and the principles laid down in *Metropolitan Life* are untenable, and accordingly it must be concluded that the Maine severance pay law is not preempted under the *Machinists* doctrine.[30] Indeed, the opposite con-

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[29] In part, Fort Halifax argues that the severance pay law is not a valid exercise of the police power because it has not been expressly authorized by Congress. (Appellant's Brief at 22-23). This was precisely the claim rejected in *Metropolitan Life*, where the appellants asserted that "state regulation is permissible only when Congress has authorized its enactment." 105 S.Ct. at 2395.

[30] In its amicus brief the Chamber of Commerce alternatively contends that the severance pay law is preempted under the NLRA preemption doctrine derived from *San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959). (Amicus Brief at 23-26). Since no such argument is being made by Fort Halifax, the Court is free to disregard this issue. *See Knetsch v. United States*, 364 U.S. 361, 370 (1960). Moreover, this case is ineligible for preemption under *Garmon* in every conceivable respect.

First, *Garmon* does not apply to issues (1) which are of peripheral concern to the NLRA or (2) which touch state interests that are "deeply rooted in local feeling or responsibility." *E.g.*, *Farmer v. Carpenters Local 25*, 430 U.S. 290, 296-97 (1977). The severance pay statute meets both these criteria. The sole concern of the NLRA is with the collective bargaining process, not the specific terms of the employment relationship. Any possible potential for interference with the NLRA is outweighed here by the state's substantial interest in protecting the health and well being of its citizens through the severance pay law.

Second, while the Chamber of Commerce argues that the employer has a protected right to implement its last best offer after an impasse, this is not conduct that is protected under section 7 of the NLRA but, at best, is merely conduct that is

(continued on following page)

clusion would mean that the NLRA preempts virtually all state regulation of collective bargaining issues. This is precisely the result sought by the Chamber of Commerce as amicus (*see* Amicus Brief at 22-23, 28). However, such an expansion of NLRA preemption would be squarely contrary to the prior decisions of this Court establishing that the NLRA does not preempt "all state regulatory power with respect to those issues . . . that may be the subject of collective bargaining." *E.g., Malone v. White Motor Co.,*

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permitted under the NLRA. State regulation of such conduct is not preempted under *Garmon. See Belknap, Inc. v. Hale,* 463 U.S. 491 (1983). Indeed, this is true even where an employer's conduct is not just permitted, but arguably required, under the NLRA. *See id.* at 522 (Blackmun, J., concurring).

Third, an employer's right to implement its last best offer is in any event contingent upon the employer's having engaged in bargaining with the union and having reached impasse. *See NLRB v. Katz,* 369 U.S. 736 (1962). In the instant case, such a right is wholly hypothetical since there is nothing in the record to indicate that Fort Halifax ever (1) bargained with its employees over severance pay in connection with the May, 1981 cessation of operations, (2) reached an impasse on this subject, or (3) attempted to implement its last best offer. Whether a hypothetical employer who had implemented its last offer after reaching impasse would have a claim to preemption under *Garmon* need not be considered since none of the requisite facts are present here.

Finally, in cases involving conduct that is arguably protected under section 7, preemption is not called for under *Garmon* unless an unfair labor practice charge is actually filed with the NLRB. *Sears Roebuck & Co. v. San Diego District Council of Carpenters,* 436 U.S. 180, 202-03 (1978). Similarly, in cases involving conduct that is arguably prohibited under section 8, preemption is not appropriate unless the issues before the NLRB would be "identical" to those before the state court. *Id.* at 197. No unfair labor practice charge was ever filed in this case, and if such a charge had been filed, the issues before the NLRB would have been entirely different than those before the state courts.

435 U.S. at 504-05. *See Motor Coach Employees v. Lockridge,* 403 U.S. 274, 289 (1971).

CONCLUSION

The judgment of the Maine Supreme Judicial Court should be affirmed in all respects.

Respectfully submitted,

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APPENDIX A

29 U.S.C. § 1001. Congressional findings and declaration of policy

(a) Benefit plans as affecting interstate commerce and the Federal taxing power

The Congress finds that the growth in size, scope, and numbers of employee benefit plans in recent years has been rapid and substantial; that the operational scope and economic impact of such plans is increasingly interstate; that the continued well-being and security of millions of employees and their dependents are directly affected by these plans; that they are affected with a national public interest; that they have become an important factor affecting the stability of employment and the successful development of industrial relations; that they have become an important factor in commerce because of the interstate character of their activities, and of the activities of their participants, and the employers, employee organizations, and other entities by which they are established or maintained; that a large volume of the activities of such plans is carried on by means of the mails and instrumentalities of interstate commerce; that owing to the lack of employee information and adequate safeguards concerning their operation, it is desirable in the interests of employees and their beneficiaries, and to provide for the general welfare and the free flow of commerce, that disclosure be made and safeguards be provided with respect to the establishment, operation, and administration of such plans; that they substantially affect the revenues of the United States because they are afforded preferential Federal tax treatment; that despite

the enormous growth in such plans many employees with long years of employment are losing anticipated retirement benefits owing to the lack of vesting provisions in such plans; that owing to the inadequacy of current minimum standards, the soundness and stability of plans with respect to adequate funds to pay promised benefits may be endangered; that owing to the termination of plans before requisite funds have been accumulated, employees and their beneficiaries have been deprived of anticipated benefits; and that it is therefore desirable in the interests of employees and their beneficiaries, for the protection of the revenue of the United States, and to provide for the free flow of commerce, that minimum standards be provided assuring the equitable character of such plans and their financial soundness.

(b) Protection of interstate commerce and beneficiaries by requiring disclosure and reporting, setting standards of conduct, etc., for fiduciaries

It is hereby declared to be the policy of this chapter to protect interstate commerce and the interests of participants in employee benefit plans and their beneficiaries, by requiring the disclosure and reporting to participants and beneficiaries of financial and other information with respect thereto, by establishing standards of conduct, responsibility, and obligation for fiduciaries of employee benefit plans, and by providing for appropriate remedies, sanctions, and ready access to the Federal courts.

(c) Protection of interstate commerce, the Federal taxing power, and beneficiaries by vesting of accrued benefits, setting minimum standards of funding, requiring termination insurance

It is hereby further declared to be the policy of this chapter to protect interstate commerce, the Federal taxing power, and the interests of participants in private pension plans and their beneficiaries by improving the equitable character and the soundness of such plans by requiring them to vest the accrued benefits of employees with significant periods of service, to meet minimum standards of funding, and by requiring plan termination insurance.